

A

A M ARUMUGAM

v.

STANDARD CHARTERED BANK

B

COURT OF APPEAL, PUTRAJAYA

MOHD NOOR AHMAD JCA

ALAUDDIN MOHD SHERIFF JCA

MOHD GHAZALI YUSOFF JCA

[CIVIL APPEAL NO: S-04-38-1997]

C

29 DECEMBER 2005

BANKING: *Securities for advances - Charge to secure credit facilities - Judgment debtor pledged goods to bank - Judgment creditor seized and sold said goods by way of auction - Whether there was an equitable charge created in favour of bank - Whether an equitable charge prevailed over a legal execution - Whether bank entitled to proceeds of sale of said goods*

CONTRACT: *Security - Banking business - Judgment debtor pledged goods to bank as security - Whether bank could exercise rights as pledgee - Whether there was sufficient evidence of default by judgment debtor - Contracts Act 1960, s. 129*

BANKING: *Securities for advances - Charge to secure credit facilities - Judgment debtor pledged goods to bank - Whether bank could exercise rights as pledgee - Whether there was sufficient evidence of default by judgment debtor - Contracts Act 1960, s. 129*

BANKING: *Securities for advances - Charge to secure credit facilities - Whether documents used in creation of charge void due to non-registration under s. 3 Bills of Sale Ordinance No. 3 of 1936 (Sabah)*

This was an appeal by the appellant/judgment creditor ('the JC') against the decision of the learned High Court judge ('the learned judge') dismissing his appeal against the learned Sessions Court judge's decision made in the interpleader proceedings, ordering the proceeds of the sale of goods seized from the premises of the judgment debtor ('the JD') to be released to the respondent bank ('the claimant'). The JD was at all material times a partner of a firm which had executed the following in favour of the claimant:

(i) a Letter of Hypothecation and Agreement to Pledge ('LOH');
(ii) a General Memorandum of Pledge of Goods or Produce ('MOP'); and (iii) a Trust Receipt ('TR'). The goods pledged to

the claimant by the JD were stocks of textiles stored at a shophouse ('the said premises'). The claimant obtained final judgment against the JD on 14 March 1990 for the sum of RM26,450.24 with interests and costs. The JC, however, had earlier sued the JD and obtained judgment against the JD for outstanding rentals. The JC seized all textiles and goods from the said premises and, pursuant to an order dated 4 April 1987, sold them by way of auction. The claimant filed an interpleader summons on 25 June 1990 for the return of the proceeds of sale of the said goods on the ground that the JD had executed the LOH, MOP and TR in its favour. The learned Sessions Court judge allowed the claim, and upon appeal, the learned judge upheld that decision by finding that there was an equitable charge created by the LOH, MOP and TR, prevailing over a legal execution, in favour of the claimant. The main issue requiring consideration was whether the learned judge had erred in law and in fact in reaching such a conclusion.

Held (dismissing the appeal)

Per Alauddin Mohd Sheriff JCA:

- [1] The learned judge was correct in holding that the LOH, MOP and TR, when read together, amounted to evidence of constructive delivery of the said goods to the claimant. The learned judge was also correct in holding that the LOH was a form of equitable charge over goods without possession or documents of title, and that it was different from a pledge because the latter required delivery of possession or documents of title. Further, the learned judge was right in holding that the TR showed that the JD "in unequivocal terms acknowledged that the textile or the documents of title to them, were given to him by the claimant and to be held by him as a trustee for the claimant". There was no doubt that there was an intention to create a charge of the goods or textile and an equitable charge was in fact created, if not a pledge. The whole commercial purpose of those documents was to create a charge, and to construe them as not amounting to a charge was too unreasonable to be sustained. (paras 10, 11, 16 & 20)
- [2] It was the JC's contention that the claimant's rights as a pledgee were only exercisable when there was a default by the pledgor under s. 129 of the Contracts Act 1950 and as there was no evidence at all of such fault, it was wrong in law and

- A in fact for the learned judge to have decided that the claimant was entitled to the proceeds of sale of the said goods. With respect, from the facts and circumstances of this case, there was sufficient evidence of default by the JD in that he owed the claimant a sum of money and could not pay the claimant.
- B (para 21)

- [3] The learned judge was also correct in deciding that the three documents (the LOH, MOP and TR) were not void for non-registration under s. 3 of the Bills of Sale Ordinance No. 3 of 1936 (Sabah) as he found that they were not bills of sale.
- C Neither was the learned judge wrong in deciding that an equitable charge prevailed over a legal execution as the JC could only take what the JD was entitled to possession and took them subject to the rights of others, in this case, the claimant. (para 22)
- D

Bahasa Malaysia translation of headnotes

- Ini adalah rayuan perayu/pemiutang penghakiman ('JC') terhadap keputusan Hakim Mahkamah Tinggi ('Yang Arif Hakim') yang
- E mengetepikan rayuannya terhadap keputusan Hakim Mahkamah Sesyen, yang diputuskan di prosiding interplider, mengarahkan supaya hasil kutipan jualan barangan yang disita dari premis penghutang penghakiman ('JD') dibebaskan kepada responden bank ('penuntut'). JD adalah seorang rakan kongsi sebuah firma yang
- F telah memeterai dokumen-dokumen berikut bagi manfaat penuntut: (i) sepucuk surat Gadaian dan Perjanjian Sandaran ('LOH'); (ii) Memorandum Am Penyandaran Barangan atau Hasil ('MOP'); and (iii) Resit Amanah ('TR'). Barangan yang disandarkan kepada penuntut oleh JD adalah bekalan tekstil yang disimpan di sebuah
- G rumah kedai ('premis tersebut'). Penuntut memperoleh penghakiman muktamad terhadap JD pada 14 Mac 1990 bernilai RM26,450.24 berserta faedah dan kosnya. JC, walau bagaimanapun, sebelum itu telah mendakwa JD serta memperoleh penghakiman terhadap JD bagi sewa yang belum dijelaskan. JC
- H menyita semua tekstil dan barangan daripada premis tersebut dan, selaras dengan perintah bertarikh 4 April 1987, menjualkannya secara lelong. Penuntut memfail saman interplider pada 25 Jun 1990, bagi mendapat kembali hasil jualan barangan yang berkenaan atas alasan bahawa JD telah melaksanakan LOH, MOP, dan TR
- I bagi manfaatnya. Hakim Mahkamah Sesyen membenarkan tuntutan, dan Yang Arif Hakim mengesahkan keputusan tersebut dengan memutuskan bahawa terdapatnya gadaian ekuiti yang

diwujudkan oleh LOH, MOP and TR, yang mengatasi suatu pelaksanaan undang-undang, bagi manfaat penuntut. Isu utama yang perlu diberi pertimbangan adalah sama ada Yang Arif Hakim telah membuat kesilapan di sisi undang-undang atau fakta-fakta dalam mencapai kesimpulannya.

Diputuskan (menolak rayuan)
Oleh Alauddin Mohd Sheriff HMR:

[1] Yang Arif Hakim betul apabila memutuskan bahawa LOH, MOP dan TR, apabila dibaca secara bersama, membuktikan bahawa terdapat penyerahan konstruktif barangan tersebut kepada plaintiff. Yang Arif Hakim juga betul dalam memutuskan bahawa LOH adalah berbentuk suatu gadaian ekuiti terhadap barangan tanpa milikan atau dokumen hakmilik, dan bahawa ia adalah berlainan dari sandaran kerana ia memerlukan penyerahan milikan atau dokumen hakmilik. Seterusnya, Yang Arif Hakim juga tepat dalam memutuskan bahawa TR menunjukkan bahawa JD “dengan nyata mengakui bahawa tekstil atau dokumen-dokumen hakmilik, telah diberi kepadanya oleh pihak penuntut dan dipegang olehnya sebagai pemegang amanah”. Tidak ada keraguan bahawa terdapat niat untuk mencipta gadaian terhadap barangan atau tekstil, dan gadaian ekuiti sememangnya telah di bentuk, jika pun bukan satu sandaran. Tujuan komersil dokumen tersebut pada keseluruhannya adalah untuk mencipta satu gadaian, dan mentafsirkannya sebagai bukan gadaian adalah sangat tidak munasabah untuk dipertahankan.

[2] Adalah menjadi hujah JC bahawa hak penuntut sebagai penerima sandaran hanya boleh dilaksanakan apabila terdapat kemungkiran oleh pihak pemberi sandaran dibawah s. 129 Akta Kontrak 1950, dan oleh kerana tiada sebarang bukti langsung tentang kemungkiran tersebut, Yang Arif Hakim telah membuat kesilapan di sisi undang-undang dan fakta apabila memutuskan bahawa pihak menuntut berhak ke atas hasil jualan barangan berkenaan. Dengan hormat, dari fakta-fakta dan hal keadaan kes ini, terdapat keterangan mencukupi mengenai kemungkiran JD dalam ertikata bahawa beliau telah berhutang kepada penuntut sejumlah wang serta tidak mampu untuk menjelaskannya.

- A [3] Yang Arif Hakim juga betul apabila memutuskan bahawa ketiga-tiga dokumen (LOH, MOP dan TR) tidak menjadi tak sah kerana tidak berdaftar di bawah s. 3 Ordinan Bil Jualan No. 3 1936 (Sabah), atas dapatan bahawa ia bukanlah bil jualan. Yang Arif Hakim juga tidak salah dalam memutuskan
- B bahawa gadaian ekuiti mengatasi pelaksanaan undang-undang, oleh kerana JC hanya boleh mengambil apa yang JD berhak mengambil kedalam milikannya dan mengambilnya tertakluk kepada hak-hak orang lain, iaitu, penuntut dalam kes ini.

- C **Case(s) referred to:**
David Allester, Ltd [1922] 2 Ch 211 (refd)
Re Lin Securities (Pte) [1988] 2 MLJ 137 (foll)
UMBC v. Aluminex (M) Sdn Bhd [1993] 3 MLJ 587 (refd)

Legislation referred to:

- D Bills of Sale Ordinance No 3 of 1936 (Sabah), s. 3
 Contracts Act 1950, s. 129

Other source(s) referred to:

Paget's Law of Banking, 8th edn, pp 562, 564, 566, 567, 568, 569, 570

- E *For the appellant - Alex Khoo; M/s Peter Loo & Co*
For the respondent - Edwin Tsen; M/s Tan Pang Tsen & Co
Reported by Suresh Nathan

F

JUDGMENT

Alauddin Mohd Sheriff JCA:

Introduction

- G [1] This is an appeal by the appellant ("the judgment creditor") against the decision of the learned High Court Judge at Sandakan, dismissing his appeal against the decision of the learned Sessions Court Judge ("SCJ") made in the interpleader proceedings by
- H which the SCJ ordered the proceeds of the sale of the goods seized from the premises of K.S.K. Mohamad Yassan Rawther ("the judgment debtor") to be released to the respondent bank ("the claimant"). For convenience, in this appeal, I will refer to the parties according to the titles assigned to them in the court below.

I

Facts Of Case

- [2] The judgment debtor was at all material times a partner of Syarikat Rose Emporiums ("the firm"). The firm had executed in favour of the claimant (1) a Letter of Hypothecation and Agreement to Pledge (LOH) dated 8 May 1978 (exh. PNCS1) (2) a General Memorandum of Pledge of Goods or Produce (MOP) dated 20 January 1986 (exh. PNCS2) and (3) Trust Receipt (TR) dated 20 January 1986 (exh. PNCS3). The goods pledged to the claimant by the judgment debtor were stocks of textiles stored at shophouse No. 24, Jalan Pryer, Sandakan ("the said premises").
- [3] Final judgment was obtained by the claimant against the judgment debtor on 14 March 1990 for the sum of RM26,450.24 with interest at 10% p.a. from 8 July 1987 until full payment, costs of RM775 and further advertising costs of RM120.
- [4] The judgment creditor had earlier sued the judgment debtor and had obtained judgment against the judgment debtor for outstanding rentals.
- [5] The judgment creditor seized all textile and goods from the said premises and pursuant to an order dated 4 April 1987 sold by way of auction all the goods seized.
- [6] An interpleader summons was filed by the claimant on 25 June 1990 claiming for the return of the proceeds of sale of the said goods on the ground that the judgment debtor had executed exhs. PNCS1, PNCS2 and PNCS3 in its favour.
- [7] The claimant filed an affidavit affirmed by Paul Ngui Chee Sheng on 22 August 1990.
- [8] There was no affidavit in opposition filed by the judgment creditor.

Grounds Of Appeal

- [9] Before us, the learned judge's decision was attacked on the following grounds:
- (a) Since there was no evidence at all of any document of title or delivery of such document of title the learned judge erred in law and in fact in construing that the three documents mentioned above when read together, amounted to evidence of constructive delivery of the said goods to the claimant;

- A (b) In ruling or otherwise deciding that the trust receipt dispensed with the need for the claimant to prove delivery of the specific goods seized for the purpose of deciding whether there was a valid pledge of the specific goods, the learned judge is said to have erred in law and in fact;
- B (c) Again, the learned judge erred in law and in fact when he decided that there was a valid pledge of the said goods when in fact there was no evidence that the said goods seized were the same goods that were pledged to the claimant;
- C (d) The learned judge erred in law and in fact in ruling or otherwise deciding that the claimant was entitled to the proceeds of sale of the said goods in failing to consider that the claimant's rights as a pledgee is only exercisable when there was a default by the pledgor under s. 129 of the Contracts Act 1950 and that there was no evidence at all of such default;
- D (e) The learned judge erred in law and in fact in ruling or otherwise deciding that there was an equitable charge created by the said three documents in favour of the claimant by failing to consider at all whether such a charge would be void or not for non-registration thereof as a bill of sale under s. 3 of the Bill of Sale Ordinance No. 3 of 1936 (Sabah) and further erred in ruling that an equitable charge prevails over a legal execution.
- E
- F

Court's Findings

- G [10] Having carefully perused the record of appeal and painstakingly studied the judgment of the learned judge we find that the learned judge was correct in holding that the LOH, MOP and TR (see pp. 14-17 appeal record) when read together, amounted to evidence of constructive delivery of the said goods to the claimant.

- H [11] In this respect, we can do no better than to refer to His Lordship's judgment where he said (see pp. 20 and 21 appeal record):

- I When the three documents are read together, it is clear as between the Judgment Debtor and the Claimant that the goods or documents of title were delivered to the Claimant and redelivered to the Judgment Debtor. In any event it is trite law that the Judgment Debtor, in the face of his written acknowledgement in

the Trust Receipt, will not be allowed to say or to adduce evidence to say, in contradiction to his written acknowledgement, that the goods and titles were not originally delivered by him to the Claimant by way of pledge or security and thereafter redelivered to him by the Claimant. This means there is no need for the Claimant, as against the Judgment Debtor and in view of the Judgment Debtor's acknowledgement, to adduce evidence that there was delivery of the goods or documents of title by the Judgment Debtor to the Claimant and of its redelivery vice versa. This also means the Judgment Debtor would not have been able to dispute the existence of a valid pledge. Consequently, if the Claimant was to claim possession of the goods, the Judgment Debtor would not be able to say there was no valid pledge. What then is the position of the Judgment Creditor vis a vis that of the Claimant? The Judgment Creditor stands in the shoes of the Judgment Debtor and he has as against the Claimant no higher or better right than the Claimant at the date of the seizure of the goods (*Madras Official Assignee v. Mercantile Bank of India Ltd.*, pp. 64-65).

A

B

C

D

[12] Referring to the issue of 'Pledge by real owner', the writer in *Paget's Law of Banking* 8th edn had this to say (at p. 562):

E

Where the real owner and possessor is the person seeking an advance on the security of the goods, the pledge is not complete unless and until there has been actual or constructive delivery of the goods.¹⁶

[13] Further, (at p. 564) the writer continued:

F

The position is also clearly and fully put by Lord Wright, giving the decision of the Privy Council (three of whose members were members of the House of Lords) in *Madras Official Assignee v. Mercantile Bank of India, Ltd.*⁵. The case was decided on the Indian Code (which goes further than the English), and under which it was then possible for the owner of goods to obtain a loan on the pledge of the documents of title without giving notice to the custodian and obtaining his attornment, a course which, in English law, is open only to a 'mercantile agent'. Lord Wright described this as "a curious and anomalous position" and suggested that the facts of the case illustrate well the reasonableness of a change in the law. The full text of Lord Wright's summary of the English law of pledge is given and is as follows.⁷

G

H

I

- A At the common law a pledge could not be created except by a delivery of possession of the thing pledged, either actual or constructive. It involved a bailment. If the pledgor had the actual goods in his physical possession he could effect the pledge by actual delivery; in other cases he could
- B give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him
- C from the pledgor to hold for the pledgee, the change being perfected by the third party affirming to the pledgee, that is acknowledging that he thereupon held for him; there was thus a change of possession and a constructive delivery: the goods in the hands of the third party became by this process in the possession constructively of the pledgee.
- D

[14] On the issue of Letters of Hypothecation the writer commented (at p. 566):

- E This difficulty in the way of the owner's being in a position to pledge goods in his own possession has been circumvented by the institution of letters of lien or letters of hypothecation.
- F The distinction seems a narrow one, but it is clear that an owner, though he cannot himself pledge, may, by agreement, change his possession into that of bailee for the pledgee, and that the instrument constituting him such is 'one used in the ordinary course of business as proof of the possession or control of goods' within the exception to the Bills of Sale Act, and takes the goods out of his 'order and disposition'. One might originally have doubted this, but there is the authority of Lord Mersey that such documents evidence a transaction of the most ordinary kind
- G as between bankers and merchants and that such transactions happen by the score every day in the great commercial centres. The words 'we hold on your account and under lien to you', which usually occur in these documents, may be taken to have the effect of converting the possession of the owner into that of
- H a bailee from the pledgee.

[15] Under the heading "*Letters of trust*" (see p. 570) the writer described as follows:

- I Where the depositor of documents of title under pledge requires their return to him in order that he may obtain and warehouse or sell the goods, the re-delivery of the documents may be said to substitute for the banker's pledge the right to have the documents

and the goods they represent held in trust for the bank and the right to the proceeds of sale. If the purpose of the pledgor is to obtain delivery of the goods, he undertakes in the letter to have the goods warehoused in the bank's name. By a letter of trust a banker is able to preserve his security rights, except in the case of fraud on the part of the borrower to whom the documents are returned. The common law rule, that relinquishing possession of goods or the documents of title to them destroys the title underlying the pledge to which they were subject, does not apply where the re-delivery is for a specific limited purpose. The point was made clear by the House of Lords in *North-Western Bank v. Poynter*⁵, Lord Herschell, LJ asserting,

There can be no doubt that the pledgee might hand back to the pledgor, as his agent for the purpose of sale, as was done in this case, the goods he had pledged without in the slightest degree diminishing the full force and effect of his security.

[16] We also find that the learned judge was correct in holding that the LOH is a form of equitable charge over goods without possession or documents of title and that it is different from a pledge because the latter requires delivery of possession or documents of title.

[17] The learned judge's finding finds support in the case of *Re Lin Securities (Pte)* [1988] 2 MLJ 137. In that case, the plaintiffs were the liquidators of Lin Securities (Pte) Ltd. ("the company"). Prior to the appointment of the liquidators, the company received credit facilities from 21 banks, ie, the 21 defendants. The company in return gave various letters of hypothecation ("LOH") whereby the assets of the company were purportedly charged to the 21 banks. The main issue there was whether each LOH created a charge and if so, whether the charge was a fixed or floating charge. There the court held that one should not determine the effect of the LOH wholly within the four corners of the document. It must be viewed in the context of the surrounding circumstances of the transaction. The transaction must be viewed in the commercial context in which the LOH was given.

[18] We feel it is pertinent that we refer to the judgment in that case. In his judgment (at p. 140) Chao Hick Tin JC (as he then was) examined the term "hypothecation" and this is what His Lordship said:

- A I think it would be appropriate if I begin by briefly examining the term “hypothecation”. According to Gutteridge & Megrah: *Law of Bankers’ Commercial Credits* (6th Ed.) the term “hypothecation” crept into English legal terminology possibly by way of maritime law in which it is used to denote a transaction by which maritime property is made available as security for a debt without transfer to the creditor either of property or possession. Hypothecation is not a term of art. It would appear that letters of hypothecation are most commonly used in relation to goods.
- B
- C Holden on *Securities for Bankers’ Advances* (5th Ed.) refers to it as (at p. 268) “a legal transaction whereby goods may be made available as security for a debt without transferring either the property or the possession to the lender”. Similarly, Gutteridge & Megrah at p. 187 states that strictly the term “letter of hypothecation” is “to be applied to the case where the banker is given a charge over goods without possession of them or of the documents of title and even before they are in existence”. However, *Hart on Law of Banking* (4th Ed.) Vol. II at p. 906 seems to define it a little wider thus: “Where property is charged with the amount of a debt, but neither ownership nor possession is passed to the creditor, it is said to be hypothecated.”
- D
- E The contract of hypothecation is to be distinguished from pledge in that a pledge entails delivery of possession whereas a hypothecation does not. Hypothecation is a form of equitable charge.
- F [19] Further down the judgment His Lordship added:
- G No particular form of words is necessary for the purpose of creating a charge. Any written instrument showing the intention of the parties that a security should be thereby created would suffice although it contains no general words of a charge: see *Fisher & Lightwood on Law of Mortgages* (9th Ed.) at p. 13.
- H It is enough that the parties have made it plain by the language they have used that it was their intention to create a charge: Bankes LJ in *National Provincial & Union Bank of England v. Charnley*.⁽³⁾ In the same case, Scrutton LJ said the following at page 445:
- I I am not going to attempt an exhaustive definition of an equitable charge, but I think that the substance of an equitable charge is this: if an agreement be made to grant some interest in existing or future property for the purpose of securing the payment of a debt, that agreement to give the security confers an equitable security or charge, though all the formalities necessary to create the actual security have not been complied with.

And Atkin LJ stated the following at pp. 449-450:

It is not necessary to give a formal definition of a charge, but I think there can be no doubt that where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt and that the creditor shall have a present right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right to possession, but only gets a right to have the security made available by an order of the court. If those conditions exist, I think there is a charge.

... While the expression used in some of the LOHs issued to the other banks was “pledge” or “hold under lien”, in my view, these expressions meant and were intended to mean in the context very much the same thing, i.e. creation of a charge.

[20] Further, we find that the learned judge was also correct in holding that the trust receipt showed that the judgment debtor “in unequivocal terms acknowledged that the textile or the documents of title to them, were given to him by the claimant and to be held by him as trustee for the claimant. I have no doubt that there was an intention to create a charge of the goods or textile and an equitable charge was in fact created, if not a pledge. The whole commercial purpose of those documents was to create a charge and to construe those documents as not amounting to a charge, as advocated by Mr. Alex Khoo, is too unreasonable to be sustained. (see p. 24 appeal record)”. (see *In re David Allester, Limited* [1922] 2 Ch.211 and *UMBC v. Aluminex (M) Sdn. Bhd.* [1993] 3 MLJ 587 (SC))

[21] It was the judgment creditor’s contention (under ground (d)) that the claimant’s rights as a pledgee is only exercisable when there was a default by the pledgor under s. 129 of the Contracts Act 1950. As there was no evidence at all of such fault it was wrong in law and in fact for the learned judge to have decided that the claimant was entitled to the proceeds of sale of the said goods. With respect, from the facts and circumstances of this case there was sufficient evidence of default by the judgment debtor in that he owed the claimant a sum of money and could not pay the claimant. In the premises we find that grounds (a) to (d) are without merits.

- A [22] As to the last ground of appeal, we also find that the learned judge was right in deciding that the three (3) documents were not void for non-registration under s. 3 of the Bills of Sale Ordinance No. 3 of 1936 (Sabah) as he found that they were not bills of sale (see *Paget's Law of Banking*, 8th edn, pp. 567 to 570).
- B Neither was the learned judge wrong in deciding that an equitable charge prevailed over a legal execution as the judgment creditor can only take what the judgment debtor is entitled to possession and takes them subject to the rights of others, in this case, the claimant. In the premises, the last ground is also without merit.
- C [23] For the reasons we have given above, we are unanimous that this appeal should be dismissed with costs. The deposit is to go to the claimant to account of taxed costs.
- D [24] My learned brother Mohd. Ghazali Mohd. Yusoff JCA has seen this judgment in draft and has expressed his agreement with it. Our learned brother Mohd. Noor Ahmad JCA (later FCJ) has since retired.
- E
-
- F
- G
- H
- I